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In the Supreme Court of the United States

OCTOBER TERM, 1962

RICHARD STARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI DENIED

ARCHIBALD COX,
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
Department of Justice,
Washington, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 978

RICHARD SYLVIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-11) is reported at 312 F. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1963. A petition for rehearing was denied on March 7, 1963. The petition for a writ of certiorari was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the particular circumstances of this case, the judge's charge that the burden of proving entrapment is on the defendant, requires reversal of the conviction.

STATEMENT

Petitioner was convicted in the United States District Court for Massachusetts on four counts charging sales of heroin on two occasions and was sentenced to imprisonment for five years.

The government's evidence showed that on November 24, 1960, an undercover agent met petitioner outside a cafe, and asked petitioner if he knew where Deke was (R. 27-28). The agent had met petitioner at the cafe the night before when the agent was with Deke and had told petitioner he was having trouble getting narcotics (R. 38, 42, 47). Petitioner said that he did not know Deke's whereabouts, but that he would be glad to help (R. 27-28). The agent said he was interested in a $5.00 bag. Petitioner then sold the agent for $5.00 a bag which proved to contain heroin (R. 5-6, 28). The next night, at the cafe, petitioner told the agents he had two bags left. The agent bought for $5.00 another bag which also was shown to contain heroin (R. 30).

Petitioner testified that on the evening of November 23, he was having a drink with Denis Chandler (Deke) when a man named "Whizzer", who was with the agent, called Chandler over. Thereafter Chandler went out. Whizzer asked petitioner whether he had $8.00 and would do him a favor and pick

up two packages for $8.00 from a man down the street. Petitioner did so. On his return, Whizzer told petitioner to give the agent one package for which the agent gave petitioner $5.00 (R. 58-60).[1] The next evening, at the cafe, petitioner asked Whizzer what to do with the other package and was told to give it to the agent. The agent gave him $5.00 (R. 63-64).

The judge charged the jury *inter alia* that if petitioner "did not know what he was disposing of, if he disposed of something, then of course he could not be found knowingly to have sold heroin" (R. 70).

As to the defense of entrapment, which petitioner's counsel had raised in his opening statement (see R. 72), the court charged, *inter alia* (R. 72-73):

> If a public official creates a crime which would never have occurred in any way except because of his actions, under those circumstances you look to see whether the defendant was entrapped.
>
> * * * *
>
> To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. That is, you look to see whether the man is disposed to commit a crime. There are many ways of determining whether he is prepared to commit a crime. Because he is in a business which is criminal—that is one indication. Another indication is if he has previously engaged in similar offenses. But a third kind

[1] Petitioner testified that this occurred in the cafe (R. 60) and not, as the agent had testified, in front of a luncheonette (R. 28, 43-44).

of evidence is if he shows a readiness to initiate the conduct himself.

After discussing the evidence the judge said (R. 73):

> But the question you have to address yourself to is this: Did this transaction originate in the mind of Gibson? Did he induce a well disposed person to commit a wrong that he never would have committed?
>
> Or, on the contrary, was the situation one in which a person who had the willingness to engage in crime either made the first approach or, if you please, readily responded the moment the suggestion was made to him?
>
> It's all a question of fact: The defendant who raises the defense of entrapment has the burden of proving entrapment. But the Government has the burden of proving beyond a reasonable doubt every other element of crime.

Petitioner's counsel objected to the instruction on the burden of proving entrapment (R. 74). Thereafter the judge told the jury (R. 74):

> I want to make it quite clear that a person prosecuted for an offense shall be acquitted if he proves that his conduct occurred in response to an entrapment.

The court of appeals held that it need not determine whether the judge's charge was legally accurate[*]

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[*] Subsequent to the decision in this case the First Circuit held that it is correct to charge that the burden of proving inducement by a preponderance of the evidence is on a defendant and that the government then has the burden of proving beyond a reasonable doubt that the defendant was ready and willing to commit the offense at a propitious opportunity. The court found error in the failure of the trial judge af-

since there was no basis in the evidence for a charge of entrapment.

The court held that on the government's evidence, there was no issue of entrapment and that petitioner's testimony raised no such issue in view of the instructions that petitioner could not be found guilty unless he knew the package contained heroin. It pointed out that if petitioner's claim of not knowing the contents of the package was not credited, his whole story of deception amounting to entrapment collapsed. It stated that "a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment."

ARGUMENT

It is true, as petitioner asserts, that there is considerable confusion and disagreement in the courts of appeals as to whether, with relation to the defense of entrapment, the instructions of the trial judge should deal with the burden of proof on that specific issue and, if so, what the proper charge as to the burden of proof should be. Nevertheless, we do not think that this is an appropriate case in which to consider that question, for, with the court of appeals, we do not believe that any issue of entrapment was in fact presented by this record.

Petitioner, we believe, misreads the opinion below as holding that the defense of entrapment is not

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firmatively to instruct the jury that the defendant's burden of persuasion was only by a preponderance of the evidence. *Gorin* v. *United States*, 313 F.2d 611, decided February 20, 1963.

available to one who denies the commission of the offense. The decision holds only that "a defendant's testimony to the effect that he did not commit the crime *cannot raise an issue of entrapment*." This is not inconsistent with the principle of the cases cited by petitioner as in conflict with the ruling below, such as *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C.), where the District of Columbia Circuit held that it was "consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment." In other words if anything in the evidence indicates entrapment, that issue must be submitted to the jury, but a defendant cannot claim that his own evidence raises an issue of entrapment when he himself denies that the offense ever occurred.

In this case, nothing in the evidence for either side raised an issue of entrapment. The government's evidence was that the agent did not even suggest that

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In its later opinion in *Gorin* v. *United States*, the court below said (313 F.2d at 634, n. 10): "It is inconsistent for an accused to take the stand and deny the commission of the crime charged and then assert his right to a charge on the defense of entrapment. See *Sylvia* v. *United States*, 1 Cir., 312 F.2d 145. However, where there is evidence of governmental inducement, it is not fatally inconsistent for an accused to keep silent in the hope that the jury will not find that the government has proved its case beyond a reasonable doubt, but ask that the jury be charged on the defense of entrapment if it should find the commission of the allegedly criminal acts. The law allows this much inconsistency. See *Henderson* v. *United States*, 237 F. 2d 169, 172-173 (C.A. 5, 1956)."

petitioner sell him narcotics, that petitioner on his own offered to help when the agent asked whether petitioner knew where Dole was. The agent testified at the trial that he did not know that petitioner was selling narcotics and did not want to buy from him because he had never found a seller of narcotics to be so overt (R. 46-47). Certainly the prosecution witnesses suggested no issue of entrapment. Nor did petitioner. Although he labelled his defense "entrapment", it was not entrapment in the legal sense, but a denial of any willful action. Petitioner's defense was that he obtained two packages as a favor to "Whizzer" and delivered them to the agent for Whizzer without knowing what was in them. If the jury believed petitioner, they had to acquit. The judge instructed the jury to decide first whether there had in fact been a sale and specifically charged that, if petitioner did not know what he was disposing of, he could not be found knowingly to have sold heroin (R. 70). Since it was perfectly clear from the judge's charge that the burden was on the government to prove a sale beyond a reasonable doubt, the jury had to reject petitioner's testimony and accept the agent's as proving a sale beyond a reasonable doubt. As the court of appeals pointed out, if petitioner's "testimony about not knowing what was in the packages is not credited, his whole story of deception amounting to entrapment collapses." The consequence is that the error, if any, in the entrapment charge was harmless. Petitioner received more than his due.

Under these circumstances, we believe that the petition for a writ of certiorari may properly be

denied. However, since the questions presented here with respect to entrapment are similar to those before this Court in *Lopez* v. *United States*, No. 236, this Term, the Court may wish to defer action on this petition until after its decision in *Lopez*.

Respectfully submitted,

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MAY 1963.

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